CASE notes

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Clinical negligence & duty to inform:

Rosenberg v Percival [2001] HCA 18 (5 April 2001)

Rosenberg v Percival [2001] HCA 18 is the most recent in a series of decisions by the High Court over the past decade exploring key aspects of clinical practice: *Secretary, Dept of Health & Community Services JWB & SMB ('Marion's Case')* (1992) 175 CLR 218; *Rogers v Whitaker* (1992) 175 CLR 479; *Breen v Williams* (1996) 186 CLR 71; *Chappel v Hart* (1998) 195 CLR 232; *Naxakis v Western General Hospital* (1999) 197 CLR 269.

Rosenberg clarifies aspects of the concepts and principles of 'material risk' and 'causation' in relation to duty to inform/warn that were adopted in *Rogers*, and clarifies aspects of 'loss of opportunity' and burden of proof expounded in *Chappel*. *Rosenberg* is also instructive in relation to issues of credit bearing on these substantive issues. An interesting twist is that the patient plaintiff, Dr Percival was herself an experienced clinician (viz, a nursing PhD) who sued her oral surgeon, Dr Rosenberg after undergoing a clinically indicated common dental procedure in 1993, osteotomy, to treat mild temporomandibular disorder (malocclusion).

Allegations of negligent diagnosis and treatment were abandoned, and only alleged failure to warn/inform was pursued. Several oral dental procedures were available but osteotomy was the one most likely to produce a good result, however, it did include a common risk (10%) of temporary temporomandibular complications, plus a very slight risk of more enduring and serious complications such as those which occurred to Dr Percival, producing chronic jaw pain, estimated by one expert as being in the order of one in 6,000. Dr Rosenberg conceded he had not mentioned these risks, and Dr Percival claimed she would have refused the osteotomy if she had known. The latter evidence was adduced almost as an afterthought (see paras 15, 31, 52, 109-111, 220 of the decision).

The trial judge held that the risk was not material (i.e. no breach of duty), and therefore did not need to be disclosed by Dr Rosenberg; but that even if it had been disclosed, Dr Percival would have undergone the procedure (i.e. no causation). The Full Court of the Supreme Court of Western Australia overruled these findings, but the High Court restored them. All judges in the High Court (Gleeson CJ, McHugh, Gummow, Kirby, Callinan JJ) were unanimous on the causation issue; two held it was therefore unnecessary to decide the issue of materiality of risk (Gleeson CJ & McHugh J); two expressed some reservations about certain aspects of the trial judge's finding of non-materiality, but held they could not interfere with the trial judge that a 'reasonable person' in the patient's position would not have regarded the risk as material, and the patient had not communicated that she wanted to know more than a reasonable patient (Gummow & Callinan JJ); one held that the risk was material and should have been disclosed (Kirby J). Subsequently the patient underwent further remedial surgery.

Rosenberg is instructive from an advocacy perspective, and discloses a number of insightful 'do's and 'don't's bearing on effective presentation in chief, and cross-examination to test, evidence bearing on the issues of materiality, causation and credit. *Rosenberg* also illustrates the importance of seeking to adduce evidence in chief, at an appropriate time, of any and all specific circumstances that would have made the disclosure of risk significant to the decision-making process of the 'particular patient' (i.e. the subjective second limb of *Rogers*) and not rely just on factors that may be material to a 'reasonable person in the patient's position' (i.e. the mixed objective/subjective first limb of *Rogers*). PL

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